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# BOOK REVIEWS

*War and the Law of Nations: A General History*. By STEPHEN C. NEFF. [Cambridge: Cambridge University Press. 2005. xii, 398 and (Bibliography, Table of Cases, Table of Treaties, Index) 44 pp. Hardback £55.00. ISBN 0-521-66205-2.]

THE PAST DECADE has witnessed something of an historical turn in international law, to which Stephen C. Neff has already contributed with *The Rights and Duties of Neutrals: A General History* (2000). His latest book is a spirited and enlightening addition to this literature.

Neff's work is "a history of ideas about the legal nature and character of war as such", "from the most distant retrievable past to the present day", although its concern is not with ideas in the abstract but with "the reciprocal impact of theory on practice and of practice on theory" (p. 2). The author divides his story into four eras: from the earliest records to 1600, in which the dominant legal framework is the just-war tradition of medieval natural law, and in which war is viewed as an instrument of the rule of law; 1600–1815, in which natural law is supplemented and slowly supplanted by the voluntary law of nations, and in which war metamorphoses "from a tool of God into a tool of men" (p. 4); 1815–1919, in which the dominant legal framework is legal positivism, and in which war is an unabashed clash of rival national interests, a so-called "institution" of international law; and, finally, 1919 to the present, in which Neff identifies a revival of the medieval just-war outlook in the League of Nations Covenant, the Pact of Paris and the United Nations Charter.

The narrative, written with brio and wit, is a deft synthesis of a seemingly vast array of state practice and scholarly doctrine stretching over many centuries. It is, as Neff confesses, inevitably reductionist, a few of its conclusions on specific points of law are open to question, and it is prone to overblown statements, which is probably excusable in an author of such rhetorical panache; but the general contours of the story are hard to dispute. It is also rich in delicious titbits, such as an account of the Franco-Mexican "Pastry War" of 1838.

Of particular interest, originality and value is Neff's treatment of "imperfect wars" or "measures short of war", as the various pre-1945 terminologies had it, *viz.* interventions, reprisals and armed actions driven by unavoidable necessity, encompassing self-defence and the rescue of nationals. The distinction he highlights in past practice and doctrine between a state of war and acts of war is enlightening, and his account of the history of self-defence is a revelation, with direct relevance for what today is the most vexed issue of the law on recourse to armed force, as the historical distinction between self-defence and defensive war becomes ever more blurred. It is also plain fun to be shown the historical continuities. For example, just as in medieval doctrine lawful self-defence, not being just war, required no *auctoritas*, so today self-defence, being an "inherent" right within the meaning of article 51 of the UN Charter, does not require Security Council authorisation; and just as self-defence was classically a stop-gap use of force, and not war at all, so too today the right of self defence under article 51

persists only until the Security Council has taken measures necessary to maintain international peace and security. The author's discussion, however, of the putative right to interfere with neutral shipping in furtherance of the right of self-defence would have benefited from drawing a distinction between self-defence within the meaning of article 51 of the Charter (relevant to forcible measures, arguably only against the aggressor state) and self-defence as a circumstance precluding the wrongfulness of an otherwise internationally unlawful act within the meaning of article 21 of the ILC's Article on Responsibility of States for Internationally Wrongful Acts (relevant to non-forcible measures, arguably against all states). Paragraph 5 of the ILC's commentary to article 21 is directly on point.

The only major feature of Neff's grand sweep to which one might seriously object is its misrepresentation, through commission, omission and contrast, of legal positivism, chiefly in its nineteenth-century manifestation but implicitly more generally. In terms of commission, the problem stems from an over-expansive notion of what legal positivism is, or perhaps a conflation of specifically legal positivism with positivism as a broader social scientific movement. Legal positivism may be a "protean" phenomenon (p. 161), but only to the extent that it is an ontology, an epistemology and a methodology all rolled into one. In the end, it remains no more than a philosophy of law, one which declares that law is what humans posit (or will) it to be. On the international plane, it provides that international law is what humans, through the medium of their respective organised political communities called states, make it. Neff explains this much himself (pp. 169–170). Yet he goes on to bind what is no more than a philosophy of law to the political philosophy of Thomas Hobbes and a menagerie of nineteenth-century bugbears, from Clausewitz, *Realpolitik* and Prussian militarism to social Darwinism. (Some of this is just as much a slur on Hobbes as it is on legal positivism, and it is interesting to note the absence from his bibliography of anything by Quentin Skinner.) The result is something Neff calls the "positivist view of war" (pp. 162, 177, 395), by which he appears to mean the nineteenth-century conception of war as an "institution of international law". This is not to say that he expressly blames legal positivism for all that he sees as the ills of that era; indeed, he enters a scrupulous caveat in this regard (pp. 199–201), and is frank in acknowledging positivism's benefits (*e.g.* at p. 196). But his general rhetorical emphasis, tone and labelling belie his more measured statements, insinuating guilt by association. Consider, for example, the author's reference to "the relentless and often bloody quest of self-interest that characterised the positivist tradition" (p. 285).

In terms of omission, Neff's perfectly defensible sympathies blind him to the fact that what he identifies as the twentieth-century revival of the just-war tradition and the "humanitarian revolution" were brought about through the deployment of legal positivism in the service of pacifism and humanity. As banal as it sounds, peace became the "normal" state of the international order again because states agreed that it should be so, first in the Pact of Paris and later in article 2(4) of the UN Charter. *Kriegsräson* no longer *geht vor Kriegsmanier* because, in the 1899 and 1907 Hague Rules, states posited otherwise. Indeed, it is telling that Neff should number among the radical proponents of the UN scheme of collective security—a school of thought which "shared the community-minded ethos of the medieval natural lawyers" and was "underpinned by a powerful strain of idealism" (p. 335)—none other than Hans Kelsen.

As for misrepresentation by contrast, whereas Neff talks rightly of "the grand intellectual edifice of just-war doctrine" (p. 3), a "rich heritage" (p. 168) which "stands as one of the most impressive intellectual achievements of medieval thought" (p. 49), his version of legal positivism is "thoroughly unspeculative" and "rooted in brute facts" (p. 170). It is also fundamentally amoral. The last point is of course true in one sense: positivism distinguishes the legal content of a rule from its moral content. But to the extent that this loaded term could be taken to connote that positivism itself lacks a moral basis, it is wide of the mark. Despite his many concessions to its advantages, Neff never entertains the possibility that legal positivism could represent an ethical stance—that a responsible acknowledgement of the perils of "invincible doubt" (the practical inability to discern justice in a given case, the avoidance of which Neff recognises as a handy benefit of positivism) could amount to anything more than intellectually and morally unserious pragmatism. But could not legal positivism just as easily be seen as the juridical praxis of the Renaissance humanist political virtue of prudence (*prudentia*)? Indeed, it could be said that the history of international legal conceptions of war is less one of a Manichean struggle between the forces of light and darkness than of the continuingly renegotiated relationship between the frequently competing virtues of justice and prudence.

These are issues on which reasonable people can differ, and they by no means detract from this spirited and sparkling book, which thoroughly deserved its Honourable Mention in the 2007 American Society of International Law book prizes.

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*The Human Rights of Companies: Exploring the Structure of ECHR Protection*. By MARIUS EMBERLAND. [Oxford: Oxford University Press. 2006. xxviii, 239 pp. Hardback £50.00. ISBN 0-19-928983-2.]

THE IDEA THAT COMPANIES have human rights often seems at first sight to be a contradiction in terms. In the British legal context the issue involves more difficulties than just the obvious non-human nature of companies. Most jurisdictions with written constitutions have had decades of judicial thought on the application of constitutional rights such as property, privacy and freedom of expression to artificial entities. In that process questions as to whether a corporation can have such citizenship rights emerge in a very stark context. The UK on the other hand has no such experience, and relies on a combination of the Interpretation Act 1978 (which states: "'Person' includes a body of persons corporate or incorporate") and the judiciary to resolve such issues. However, the judiciary have not shown themselves particularly adept at dealing with the problem of applying to corporations laws created for humans. In *Winkworth* v. *Edward Baron Development* [1986] 1 W.L.R. 1512, for example, Lord Templeman found that a company had a "conscience" without explaining how this could be so. In *Re Lindsay Bowman Ltd.* [1969] 1 W.L.R. 1443, Megarry J. considered a corporation's emotional state: "I must assume that the artificial and impersonal entity that we know as the limited company has been endowed with the capacity not merely of having feelings but also of feeling aggrieved". And in *Rio Tinto Zinc* v. *Westinghouse Electric* [1978] A.C. 547 the benefit of the privilege against self-incrimination was conferred on